Office - Supreme Court, U.S.
FILED
SEP 28 1982
ALEXANDER L. STEVAS,
CLERK

82-564

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DOMENIC DiIULIO, THOMAS J. LAZZARA and BERNARD P. NESSEL,

Petitioners,

vs.

BOARD OF FIRE AND POLICE COMMISSIONERS OF THE CITY OF NORTHLAKE, ILLINOIS, EUGENE MELVILLE, ROBERT ORR and WILLIAM WAGNER, MEMBERS OF THE BOARD OF FIRE AND POLICE COMMISSIONERS OF THE CITY OF NORTHLAKE, ILLINOIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STANLEY H. JAKALA
3219 Maple Avenue
Berwyn, Illinois 60402
(312) 788-5733
Attorney for Petitioners

Midwest Law Printing Co., Chicago 60611, (312) 321-0230

QUESTIONS PRESENTED FOR REVIEW

I. Does Illinois statutory law provide for validation of police sergeants' promotional examinations via a proprietary interest right?

II. Does the liberty interest concept under the due process clause of the Fourteenth Amendment of the United States Constitution embody validation of police sergeants' promotional examinations?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 3

CONSTITUTIONAL PROVISION INVOLVED . 4

STATEMENT OF THE CASE 4

ARGUMENT:

I.

Illinois Statutory Law Provides For Validation Of Police Sergeants' Promotional Examinations Via A Proprietary Interest Right . 7

II.

The Liberty Interest Concept Under The Due Process Clause Of The Fourteenth Amendment Of The United States Constitution Embodies Validation Of Police Sergeants' Promotional Examinations 12

CONCLUSION 15

APPENDIX:

A. Opinion Of The Honorable Nicholas J. Bua Of The United States District Court For The Northern District Of Illinois, Eastern Division, Dated June 5, 1980 ..... 1a

B. Opinion Of The United States Court Of Appeals For The Seventh Circuit, Chicago, Illinois, Dated June 30, 1982 ..... 8a

C. Dr. Donald Shepherd's Affidavit 19a

TABLE OF AUTHORITIES

Cases

Arnett v. Kennedy, 416 U.S. 134 (1973) 7
Bishop v. Wood, 44 L.W. 4820 (1976) 7
Board of Regents of State Colleges v. Roth, 33 L.Ed.2d 548 (1972) 7
Domenic DiIulio et al. v. Board of Fire and Police Commissioners, United States Court of Appeals Opinion #80-1966 13
Griggs v. Duke Power Co., 401 U.S. 424 (1971) 13
United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977) 7
Washington v. Davis, 426 U.S. 229, 247 n.13 (1976) 10

Constitutional Provisions And Statutes

United States Constitution, Amend. XIV ..... *passim*
42 U.S.C. § 1983 ..... 4, 12
Ill. Rev. Stat., Chap. 24, Sec. 10-2.1-1 *et seq.* .. 8, 9, 11

Other Authorities

"Foundations of Behavioral Research" Sec. Ed., by Fred N. Kerlinger (1973) 9, 10, 11
"Fairness in Selecting Employees" by Richard D. Arvey, Chap. 9, p. 223 (1979) 12

In The

Supreme Court of the United States

October Term, 1982

DOMENIC DiIULIO, THOMAS J. LAZZARA and BERNARD P. NESSEL,

Petitioners,

vs.

BOARD OF FIRE AND POLICE COMMISSIONERS OF THE CITY OF NORTHLAKE, ILLINOIS, EUGENE MELVILLE, ROBERT ORR and WILLIAM WAGNER, MEMBERS OF THE BOARD OF FIRE AND POLICE COMMISSIONERS OF THE CITY OF NORTHLAKE, ILLINOIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

On June 5, 1980, the Honorable Nicholas J. Bua of the United States District Court for the Northern District of Illinois, Eastern Division, granted the respondents' motion for summary judgment.

The basis for the United States District Court's decision was that the petitioners' third amended complaint for declaratory judgment and other relief did not establish that the cited Illinois statutory law in that complaint created a proprietary interest requiring validation for a police sergeant's promotional examination.

As a consequence the United States District Court held that the petitioners' third amended complaint challenging the validity of the City of Northlake, Illinois, December 10, 1977 sergeant's promotional examination in violation of the due process and equal protection clause of the Fourteenth Amendment of the United States Constitution was without merit (the order of June 5, 1980, of the Honorable Nicholas J. Bua is reprinted herein as Appendix A).

On June 30, 1982, the United States Court of Appeals for the seventh circuit, Chicago, Illinois, affirmed the judgment of the Honorable Nicholas J. Bua, but not for the same legal reasoning.

In its opinion, the United States Court of Appeals holds that, although the cited Illinois statutory law in the petitioners' third amended complaint for declaratory judgment and other relief does not establish a proprietary interest requiring validation of a police sergeant's promotional examination, nevertheless it does establish a liberty interest requirement that such an examination be job-related.

Further, in its opinion, the United States Court of Appeals contends that, since the affidavit of the petitioners' expert challenging the City of Northlake, Illinois, December 10, 1977, police sergeant's promotional examination related to the issue of alleged failure of the defendants to validate such an examination, that af-

fidavit was inappropriate in that it did not address itself to whether the examination was job-related.

Job-relatedness, not validation, is the required standard for challenging a police sergeant's promotional examination via the liberty interest concept under the due process clause of the Fourteenth Amendment of the United States Constitution according to the United States Court of Appeals' decision (the decision of the Appellate Court is reprinted herein as Appendix B).

Furthermore in its opinion the United States Court of Appeals affirmed the United States District Court that the petitioners had not stated an equal protection violation argument in their third amended complaint.

JURISDICTION

1. The federal questions were raised by the petitioners in their first, second amended and third amended complaints for declaratory judgment and other relief challenging the validity of the City of Northlake, Illinois, December 10, 1977 police sergeant's promotional examination from the standpoint that the examination violated the due process and equal protection clause of the Fourteenth Amendment of the United States Constitution in that validation was required pursuant to a proprietary interest right created by Illinois statutory law to this effect.

2. The Petition for Certiorari was filed within 90 days after the entry of the judgment by the United States Court of Appeals for the Seventh Circuit, Chicago, Illinois, on June 30, 1982.

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

That on June 12, 1978, the petitioners filed a complaint for declaratory judgment and other relief against the respondents.

Subsequently, pursuant to motions to dismiss, the complaint had been amended from time to time as an Amended Complaint, as a Second Amended Complaint, and finally as a Third Amended Complaint.

In the Third Amended Complaint the petitioners alleged that they had a proprietary interest in a validated or job-related examination and that they disputed the validity or job-relatedness of the Sergeant's Promotional Examination of December 10, 1977 of the City of Northlake.

That their constitutional claim was based upon 42 U.S.C. 1983, the due process and equal protection clause

of the Fourteenth Amendment of the United States Constitution.

That the petitioners claimed that the due process and equal protection clauses of the Fourteenth Amendment were violated in that their proprietary interest in a validated or job-related examination was abrogated by an invalid or non-job related examination.

That the petitioners prayed that the Sergeant's promotional examination of December 10, 1977, of the City of Northlake be declared unconstitutional, null and void and of no force and effect, and that a permanent injunction be issued.

That the respondents filed an Answer to the Third Amended Complaint admitting that the petitioners had accepted their offers of employment and had continued their employment on the basis that they would be subjected to a validated or job-related promotional examination, and answering further the respondents stated, as an affirmative defense, that the written promotional examination of December 10, 1977, was validated and job-related.

That the petitioners filed a Reply to the affirmative defense denying the validation or job-relatedness of the December 10, 1977, Sergeant's written promotional examination of the City of Northlake, Illinois.

Subsequently, the respondents filed a Motion for Summary Judgment; and the petitioners filed affidavits in opposition to Motion for Summary Judgment.

In their Motion for Summary Judgment, respondents submitted as part of their affidavits Exhibits "A" and "B" (Dissertation and Report) of Dr. Avrum J. Mendelsohn in support of their contention that their De-

cember 10, 1977, promotional examination was validated or job-related.

In their Affidavits in opposition to motion for summary judgment, the petitioners filed an Affidavit by Dr. Donald O. Shepherd, which Affidavit disputed and totally refuted the validity and job-relatedness of the December 10, 1977, promotional examination (Dr. Shepherd's Affidavit is reprinted herein as Appendix C).

On June 5, 1980, the Honorable Nicholas J. Bua granted the respondents' Motion for Summary Judgment in its entirety by holding that:

> "No requirement that the promotional test be validated or job-related (The Court understanding both terms to reflect certain specialized psychological and/or statistical procedures used to structure such examination), however, is provided in the Illinois Statutes."

In that Order the Court held that it did not address itself or rule upon the quality of examination at issue.

ARGUMENT

I.

ILLINOIS STATUTORY LAW PROVIDES FOR VALIDATION OF POLICE SERGEANTS' PROMOTIONAL EXAMINATIONS VIA A PROPRIETARY INTEREST RIGHT.

In *Bishop v. Wood*, 44 L.W. 4820 (1976) at 4821 the Court states:

> "A proprietary interest in employment can, of course, be created by Ordinance or by implied contract."

Expounding on this legal premise, in *Board of Regents of State Colleges v. Roth*, 33 L.Ed. 2nd 548 (1972) at page 561, the Court holds:

> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

Property interests, as created by State law, include, but are not limited, to due process requirements for hearings and qualifications for promotions.

In *Arnett v. Kennedy*, 416 U.S. 134 (1973) the Supreme Court of the United States holds that a property interest or vested right in connection with hearings relating to discharges for cause must be founded upon State law.

Likewise, in *United States v. The City of Chicago*, 549 F. 2nd 415 (Seventh Circuit 1977) on page 439, the Court recognizes a property interest in promotions when it asserts as follows:

"Promotions within the police department, like appointments, are strictly governed by the Illinois Municipal Code."

The interesting question that the petitioners have raised, in this instance, is whether, under the following pertinent Illinois Municipal Code, a proprietary interest exists in a validated or job-related examination:

Illinois Municipal Code, Ill. Rev. Stat., Chapter 24, §10-2.1-1, *et seq.* Chapter 24, Section 10-2.1-15 of the Illinois Revised Statutes:

"The board, by its rules, shall provide for promotion in the fire and police departments on the basis of ascertained merit and seniority in service and examination and shall provide in all cases, where it is practicable, that vacancies shall be filled by promotion. All examinations for promotion shall be competitive among such members of the next lower rank as desire to submit themselves to examination. . . . THE METHOD OF EXAMINATION AND THE RULES GOVERNING EXAMINATION FOR PROMOTION SHALL BE THE SAME AS PROVIDED FOR APPLICANTS FOR ORIGINAL APPOINTMENT."

Illinois Municipal Code, Chapter 24, Section 10-2.1-6 of the Illinois Revised Statutes:

"All applicants . . . shall be subject to an examination which shall be public, competitive, and free to all applicants unless the council or board of trustees by ordinance limit applicants to electors of the municipality, county, state, or nation and shall be subject to reasonable limitations as to residence, habits and moral character. . . . *The examinations shall be practical in character and relate to those matters which will fairly test the capacity of the persons examined to discharge the duties of the positions to which they seek appointment.* . . . The examination shall include tests of physical qualifications and health. . . . No applicant shall be examined concern-

ing his political or religious opinions or affiliations. The examination shall be conducted by the Board of Fire & Police Commissioners of the municipality."

Although the respondents in their answer to the Third Amended Complaint and in their Brief in support of their Motion for Summary Judgment do not concede that the Sergeant's promotional examination was invalid, they do acknowledge a proprietary interest in a validated or job-related sergeant's promotional examination under Illinois law.

Nevertheless, the Honorable Nicholas J. Bua determined that the language of "the examinations shall be practical in character and relate to those matters which will fairly test the capacity of the persons examined to discharge the duties of the positions to which they seek appointment" did not constitute a validated or job-related proprietary interest.

In his ruling, the Honorable Nicholas J. Bua did not cite any Illinois decisions in support of his legal position, since he noted that the issue of whether a proprietary interest exists in validated or job-related promotional examinations under the cited Illinois law in the third amended complaint was a matter of first impression.

In affirming the order of the Honorable Nicholas J. Bua, the United States Court of Appeals for the Seventh Circuit agreed that the cited Illinois statutory law did not create a proprietary interest in requiring validation or job-relatedness for a sergeant's promotional examination.

However, it is the contention of the petitioners that the language as cited by the Honorable Nicholas J. Bua does constitute validity on the basis of the following quotation from "*Foundations of Behavioral Research*" Second Edition, by Fred N. Kerlinger (1973), page 457:

"*A test or scale is valid for the scientific or practical purpose of its user.* An educator may be interested in the *nature* of high school pupils' achievement in mathematics. He would then be interested in *what* a mathematics achievement or aptitude test measures. He might, for instance, want to know the factors that enter into mathematics test performance and their relative weights in this performance. On the other hand, he may be primarily interested in knowing the pupils who will probably be successful and those who will probably be unsuccessful in high school mathematics. He may have little interest in *what* a mathematics aptitude test measures. He is interested mainly in successful *prediction.* Implied by these two uses of tests are different kinds of validity. We now examine an extremely important development in test theory: the analysis and study of different kinds of validity.

"The most important classification of types of validity is that prepared by a joint committee of the American Psychological Association, the American Educational Research Association, and the National Council on Measurements Used in Education. Three types of validity are discussed: *content, criterion-related,* and *construct.* Each of these will be examined briefly, though we put the greatest emphasis on construct validity, since it is probably the most important form of validity from the scientific research point of view."

In *Washington v. Davis,* 426 U.S. 229, 247 n.13 (1976), the United States Supreme Court elaborates upon the various validation methods as identified in the above citation to determine the fitness of an applicant for a position:

"It appears beyond doubt by now that there is no single method of appropriately validating employment tests for their relationship to job performance. Professional standards developed by the American Psychological Association in its Standards for Edu-

> cational and Psychological Tests and Manuals (1966), accept three basic methods of validation: "*empirical*" or "*criterion*" validity (demonstrated by identifying criteria that indicate successful job performance and then correlating test scores and the criteria so identified); "*construct*" validity (demonstrated by examinations structured to measure the degree to which job applicants have identifiable characteristics that have been determined to be important in successful job performance); and "*content*" validity (demonstrated by tests whose content closely approximates tasks to be performed on the job by the applicant). These standards have been relied upon by the Equal Employment Opportunity Commission in fashioning its Guidelines of Employee Selection Procedures, 29 CFR pt. 1607 (1975), and have been judicially noted in cases where validation of employment tests has been in issue. See, e.g., *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 432 (1975); *Douglas v. Hampton*, 168 U.S. App. D.C., at 70, 512 F.2d at 984; *Vulcan Society v. Civil Service Comm'n*, 490 F.2d 387, 394 (CA2 1973)."

Therefore, under the cited Illinois law, "that examinations shall be *practical* in character and relate to those matters which will fairly test the capacity of the persons examined to discharge the duties of the position to which they seek appointment" is language of the validity expressed by Fred N. Kerlinger's quotation as cited herein in that "a test or scale is valid for the scientific or practical purpose of its user."

Consequently, the purpose of the City of Northlake written Sergeant's Promotional Examination of December 10, 1977, was to include subject matter that would determine the predictability of success of the applicant seeking the position of Sergeant and that subject matter in relationship to such predictability constitutes validation or job-relatedness.

Because the Sergeant's Promotional Examination of December 10, 1977, has been disputed as to validity or job-relatedness by the petitioners' affidavit in opposition to the defendants-appellees' motion for summary judgment as furnished by Dr. Donald O. Shepherd,[1] the petitioners contend that the invalid or non-job-related December 10, 1977, City of Northlake Sergeant's Promotional Examination violates their due process and equal protection rights under the Fourteenth Amendment pursuant to 42 U.S.C. 1983, since the proprietary interest in a validated or job-related sergeant's promotional examination is provided under Illinois law.[2]

II.

THE LIBERTY INTEREST CONCEPT UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION EMBODIES VALIDATION OF POLICE SERGEANTS' PROMOTIONAL EXAMINATIONS.

In affirming the United States District Court, the United States Court of Appeals asserts that the liberty interest concept under the due process clause requires that there be "the rational relation between the particular questions formulating the examination and the functions of the job of police sergeant."

However, according to the United States Court of Appeals for the Seventh Circuit, the liberty interest concept does not require validation.

---

[1] In its opinion (App. B, p. 18a), the United States Court of Appeals holds that Dr. Shepherd's affidavit only addressed itself to validity, not job-relatedness; with that observation the petitioners disagree, and contend that both validity and job-relatedness were considered by said affidavit.

[2] Validity and job-relatedness are interchangeable. See "*Fairness in Selecting Employees*" by Richard D. Arvey, Chap. 9, p. 223 (Addison-Wesley Publishing Company, Inc. 1979).

The United States Court of Appeals decision differentiates between Title VII and the matter at hand on the legal theory that, under Title VII, professional validation is statutorily required.[3]

As a consequence the United States Court of Appeals' ruling suggests that there is a higher standard (validation) for promotional examinations when racial discrimination is asserted as differentiated from a liberty interest concept standard (job-relatedness) for promotional examinations when no discrimination is stated.

On page 5 of its opinion (App. B, p. 12a), the United States Court of Appeals states:

> ". . . Constitutional due process guarantees that no person will be arbitrarily deprived by the government of his liberty to engage in any occupation. '(T)he liberty guaranteed by the Fourteenth Amendment . . . without doubt . . . denotes not merely freedom from bodily restraint but also the right of the individual . . . to engage in any of the common occupations of life . . .'"

If liberty means to engage in any of the common occupations of life freely and without restraint for achievement, then how can one achieve his occupational goals of life without being examined validly.

As the United States Supreme Court stated in *Griggs v. Duke Power Co.*, 401 U.S. 424, 430, 434, 436 (1971):

> . . . Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualification. In short, the Act does not command that any person be hired simply because he was

[3] It is the contention of the petitioners in the argument previously advanced in this writ of certiorari that validation is required statutorily. Therefore, Title VII validation standard is applicable herein.

formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.

* * *

". . . Indeed, the very purpose of Title VII is to promote hiring on the basis of job qualification, rather than on the basis of race or color."

* * *

. . . Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress had made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.

To suggest that the liberty interest concept under the due process clause of the Fourteenth Amendment of the United States Constitution requires a lesser standard than validation defies the historical meaning of *liberty* which requires that *qualified* American citizens be provided the right to engage in a common occupation of life such as police work.

Therefore, validity in police sergeants' promotional examinations is essential to determine job-relatedness in order to preserve the liberty interests of those participating in such promotional examinations.

CONCLUSION

For the reasons given, this petition should be granted.

Respectfully submitted,

STANLEY H. JAKALA
3219 Maple Avenue
Berwyn, Illinois 60402
(312) 788-5733
Attorney for Petitioners

September 28, 1982